STATE OF MICHIGAN

COURT OF APPEALS

LINDA CIAFFONE,

Plaintiff-Appellant,

v

TEACHERS MICHIGAN PROPERTIES, f/k/a ALLIED LAND VENTURE, and REDICO MANAGEMENT, INC.,

Defendants-Appellees,

and

NEW IMAGE BUILDING MAINTENANCE, INC.,

Defendant.

UNPUBLISHED
January 27, 2004

No. 242467
Oakland Circuit Court
LC No. 00-024771-NO

Before: Fort Hood, P.J., and Bandstra and Meter, JJ.

PER CURIAM.

In this premises liability action, plaintiff appeals as of right from the trial court's order granting summary disposition to defendants Teachers Michigan Properties and Redico Management, Inc., pursuant to MCR 2.116(C)(10). In response to defendants' earlier interlocutory application for leave to appeal, this Court vacated the trial court's initial denial of summary disposition to defendants.[1] On remand, the trial court entered the order from which plaintiff now appeals. We affirm.

Plaintiff's employer was one of the first tenants in a building owned and maintained by defendants. The lobby floor of the building was made from marble tile. During an afternoon break, plaintiff took the building's elevator to the ground floor so that she could step outside to smoke a cigarette. It had begun snowing that morning, after plaintiff arrived at work, but it was

[1] *Ciaffone v Teachers Michigan Properties*, unpublished order of the Court of Appeals, entered April 24, 2002 (Docket No. 240474).

"not a heavy snow." When plaintiff walked off the elevator, she stepped directly onto the lobby's marble surface. Plaintiff, who was wearing "one-inch pumps," had no trouble walking from the elevator to the outside door and did not notice if the floor was wet or slippery. According to plaintiff's deposition testimony, there were no rugs or mats in the area of the floor on which she walked.

Plaintiff stood outside the lobby in a covered area to smoke. After a couple minutes, she retraced her route back to the elevator, walking across the same area of the floor. She again had no trouble walking, noticed nothing unusual about the floor, and had no sense of water or moisture underneath her shoes. When plaintiff reached the elevator lobby, she fell before she was able to push the elevator button. After plaintiff stood up, she noticed that there was water on the floor. She testified that there was "water moisture, not a standing puddle" on the floor. She could not say whether the moisture had any depth, what the source of the moisture was, or how long the moisture had been there. Plaintiff did not immediately seek medical attention, but was driven by her son to the emergency room that evening. Her nose was broken, and she received stitches. She later had outpatient surgery on her nose.

In plaintiff's amended complaint, she alleged that she "slipped and fell on a wet and/or slippery substance, which was on the floor in the middle of the aisle." Plaintiff contended that defendants breached a duty owed to her "by not maintaining its premises in a reasonably safe manner," which included allowing a dangerous and wet condition when defendants knew or should have known that the flooring material was of such a nature as to render it extremely slippery when wet and failing to place rugs or runners on the floor.

Defendants moved for summary disposition of plaintiff's complaint pursuant to MCR 2.116(C)(10), arguing that plaintiff had not shown that they had actual or constructive notice of the moisture on the floor, and there was no evidence that their employees or agents had caused the moisture to be on the floor. In her response, plaintiff argued that defendants were negligent in creating the unsafe condition that resulted in her injury because mats or rugs, which were later ordered and placed in the lobby, were not available when the building opened to its first tenants. Because defendants created the dangerous condition, plaintiff argued, lack of notice of the moisture on the floor was not an issue.

The trial court initially denied defendants' motion for summary disposition. Although the court specifically did not find that defendants necessarily had a duty to place rugs on the premises in the absence of evidence that the floors were unreasonably dangerous, the court also found that factual issues remained regarding whether defendants knew or should have known of the condition that allegedly resulted in plaintiff's fall. The court also noted that the credibility of defendants' agent, Jonas, who had testified that a document intended for the maintenance company was in existence on the date of plaintiff's injury, although another employee testified that she was directed to prepare the document after this litigation began, was for the trier of fact.

Defendants filed an interlocutory application for leave to appeal with this Court and moved for immediate consideration in light of the pending trial. This Court vacated the trial court's order and remanded for reconsideration of defendants' motion. In its order, this Court directed the trial court to determine (1) whether plaintiff was alleging that the floor was unsafe because it was wet, and if so whether the active negligence of defendants' employees caused that condition or whether defendants knew or should have known about the condition, and (2)

whether plaintiff was alleging that the floor was unsafe because it was not carpeted, and if so whether plaintiff had come forward with any evidence that the floor was slippery or unsafe at all times and whether defendants knew or should have known that it was unsafe.

On remand, the trial court found that there was no evidence that the floor was wet because of the negligence of defendants or their employees or that defendants knew or should have known about the moisture on the floor. Furthermore, "after reconsidering the evidence," the court also determined that there was no evidence presented that the marble floor was inherently dangerous by its nature and, therefore, there was no genuine issue of fact regarding this theory of liability. The trial court, therefore, granted defendants' motion for summary disposition.

This Court reviews a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought under MCR 2.116(C)(10) tests the factual support for the plaintiff's claim. *Id.*; *Singerman v Municipal Service Bureau, Inc*, 455 Mich 135, 139; 565 NW2d 383 (1997). In ruling on the motion, the court must consider the pleadings, affidavits, depositions, and other documentary evidence submitted by the parties. *Id.* "Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence shows that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law." *Universal Underwriters Group v Allstate Ins Co*, 246 Mich App 713, 720; 635 NW2d 52 (2001).

"To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages." Case v Consumers Power Co, 463 Mich 1, 6; 615 NW2d 17 (2000). Generally, a premises possessor "owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). A business invitor is liable for injury resulting from (1) an unsafe condition that was either caused by the active negligence of itself and its employees or (2) an unsafe condition that is known to the invitor or is of such a character or has existed a sufficient length of time that the invitor should have had knowledge of it. *Clark v Kmart Corp*, 465 Mich 416, 419; 634 NW2d 347 (2001).

The trial court correctly determined that there was no evidence that defendants or their employees caused the wetness on the floor or that they had actual or constructive notice of it. In her deposition, plaintiff testified that she walked across the lobby at the beginning of her break and retraced her steps back to the elevator on her way back. On both trips across the lobby, plaintiff had no trouble walking, did not notice anything unusual, and did not notice if the floor was wet or slippery. Plaintiff specifically testified that she did not notice any water or moisture beneath her feet before her fall. Although she did notice water on the floor after her fall, plaintiff called the water "moisture" and not a standing puddle. She did not know how long the moisture had been there.

Plaintiff presented no other testimony regarding water or moisture on the floor of the lobby on the day of her fall.[2] Thus, there was no evidence from which a jury could find that defendants or their agents created the condition of moisture on the floor or that defendants knew or should have known about the condition. *Clark, supra*. Plaintiff herself walked over the same area twice within a few minutes and testified that she did not notice water or moisture on the floor until she fell. There was no testimony or evidence that other people walked to the elevator lobby from the outside of the building around the time that plaintiff fell, which might have placed defendants on notice that moisture may have been tracked in from the outside. Plaintiff testified that no one else was outside smoking while she was on her break. Therefore, the evidence does not establish plaintiff's theory that defendants are liable because they created, knew about, or should have known about the dangerous condition of moisture on the floor, and the trial court did not err in this regard.

Regarding plaintiff's allegation that the floor was unsafe because it was not adequately carpeted on the day of her fall, the trial court did not err in finding that plaintiff failed to present evidence sufficient to raise a question of fact regarding whether the marble floor was inherently unsafe unless covered with mats or rugs in specific areas. Plaintiff alleged in her amended complaint that the "flooring material was of such a nature as to render it extremely slippery when wet, especially in the absence of floor rugs and/or runners," but there was no testimony or documentary evidence supporting this assertion. Although plaintiff's attorney complained during the second motion proceedings that establishing this would have required hiring an expert witness, plaintiff had the burden of proving, at trial, that the marble floor was inherently slippery. "Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). "If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted." *Id.* Therefore, plaintiff was required to come forward with some

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[2] We note that plaintiff alleges that the lobby was not regularly maintained during the continuing construction and that defendants manufactured a document after the litigation began to demonstrate that a day porter had the duty to clean the lobby floor. However, the issue raised below was the notice of the condition given to defendants, not whether the daily cleaning schedule was in breach. Furthermore, in the deposition pages submitted to the trial court, it is unclear whether a document regarding the day porter was manufactured because of the litigation. James Jonas testified that, where a contract did not provide guidelines for cleaning, the manager, in this building Donna Purcell, would type guidelines. Jonas *had no recollection* of asking Purcell to type a memorandum regarding the cleaning company's responsibility. Purcell testified that Jonas asked her to type a document regarding cleaning responsibilities for this building, but could not recall what month that occurred. Thus, the date of the preparation of this cleaning memorandum was not resolved or contradicted below. Rather, the only contradiction established was at whose direction the memorandum was prepared. We note that plaintiff submitted additional pages of deposition testimony from Jonas and Purcell on appeal that were not filed in the lower court record. However, we have not considered those additional pages because a party may not expand the record on appeal. *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002).

documentary evidence or deposition testimony establishing that uncarpeted marble floors are inherently unsafe because, for example, more falls or injuries occur on bare marble floors in commercial buildings than on carpeted marble floors or on floors composed of other substances. In the absence of any evidence from which a rational trier of fact could reasonably conclude that defendants, by having bare marble floors in its building, breached a duty owed to plaintiff to provide a safe premises, the trial court did not err in granting defendants' motion for summary disposition.

Plaintiff also argues that the trial court erred when it held that defendants did not necessarily have a duty to place rugs on the floor. As support for this contention, plaintiff states that, had this case been presented to a jury, the jury would have been instructed that a proprietor of a building may be found negligent in failing to employ adequate slip-preventing devices in connection with common areas that have become slippery as a result of foreseeable tracking or accumulation of water. *Perry v Hazel Park Harness Raceway*, 123 Mich App 542, 546; 332 NW2d 601 (1983). See also *Cornforth v Borman's, Inc.* 148 Mich App 469, 481; 385 NW2d 645 (1986). However, as defendants point out, this special instruction was applied in the cited cases because notice was not an issue. The instruction itself refers to "common areas that have become slippery as a result of foreseeable tracking or accumulation of water." Here, plaintiff failed to present evidence that the lobby floor was slippery at all times or that a great deal of water or moisture had been tracked into the lobby on the date in question. Therefore, the trial court did not err in holding that defendants did not necessarily have a duty to have mats or rugs on the floor.

Finally, without citation to authority and in a cursory manner, plaintiff asserts that she had a constitutional right to a trial by jury. However, because plaintiff, as the party opposing the motion for summary disposition, failed to present documentary evidence establishing the existence of a material factual dispute, defendants' motion was properly granted pursuant to MCR 2.116(C)(10). *Quinto, supra* at 362.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Richard A. Bandstra
/s/ Patrick M. Meter